GRANITE CONSTRUCTION CO.

IBLA 94-772 Decided December 13, 1996

Appeal from a decision issued by the El Centro, California, Resource Area Manager, Bureau of Land Management, demanding payment for mineral materials removed in trespass. CA 32799.

Affirmed.

1. Materials Act--Regulations: Generally--Trespass: Generally

Under 43 CFR 3610.1-7, BLM properly refused to grant a second extension of a sales contract to a purchaser of mineral materials; thereafter, trespass damages were correctly assessed for materials removed from the sales site after the extended contract had expired.

APPEARANCES: David A. Willis, Palm Desert, California, Marketing and Permitting Coordinator for Granite Construction Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Granite Construction Company (Granite) has appealed from a May 24, 1994, decision issued by the El Centro, California, Resource Area Manager, Bureau of Land Management (BLM), finding Granite in trespass and demanding payment for mineral materials removed from Federal lands in contravention of sections 302 and 310 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732 and 1740 (1994), section 1 of the Materials Act of 1946, 30 U.S.C. § 601 (1994), and implementing Departmental regulation 43 CFR 3603.1. The BLM decision found that Granite, between May 2 and 11, 1994, removed without authorization 4,380.58 tons of sand and gravel from public land in Shell Canyon near Ocotillo, Imperial County, California, and assessed the total measure of damages for the trespass, including administrative costs and overhead, at $12,270.44. Granite appealed timely from BLM's decision.

Granite does not directly dispute the amount of damages assessed by BLM or challenge the accuracy of BLM's computation of the amount of sand and gravel removed from the Shell Canyon site, but questions instead BLM's finding that the material was removed without proper prior authorization.

In a statement of reasons (SOR) filed in support of appeal, Granite argues that BLM should have extended the 6-month term of an August 18, 1993, sales contract covering the Shell Canyon materials site, so that the material removed by Granite in May 1994 could be considered to have been removed pursuant to the 1993 sales contract.

In articulating this position, Granite argues that delays in removing materials from Shell Canyon should be attributed to BLM and subtracted from the elapsed time from contract initiation so as to bring the excavation and removal in May 1994 within the contract term. Granite further suggests that, while an extension of the term of the sales agreement was granted by BLM in March 1994, it was improperly limited in duration. It is also contended that, under the special circumstances of this case, the term of the sales contract should have been for 1 year, rather than the 6-month period allowed by the agreement signed by the parties.

The sales contract executed by the parties provides, at section 6, that the term of the contract "shall expire six (6) months from the date of approval unless an extension of time is granted." Since the contract was approved on August 18, 1993, the agreement was to end in February 1994. In a letter dated December 23, 1993, however, citing delays arising from a need to control dust at the Shell Canyon site, Granite requested an extension of the sales contract "through the end of April, 1994." This request was granted by BLM on March 8, 1994, when BLM notified Granite that "Contract CA-32799 is extended thru April 30th 1994 as requested." On April 15, 1994, Granite requested a second extension of the Shell Canyon agreement, this time until June 30, 1994. On April 22, 1994, BLM denied this request, finding that "the Shell Canyon contract cannot be extended [because] regulations allow only one extension per contract."

The referenced rule appears at 43 CFR 3610.1-7, which provides that for mineral material sales such as this, BLM "may grant a one-time extension," subject to certain conditions concerning notice and justification. No appeal appears to have been taken from BLM's denial of contract extension, written notice of which was received by Granite on April 28, 1994.

While acknowledging that only a single extension could be granted for the 1993 sales contract, Granite argues that the extension granted in March 1993 "should not have counted as the extension [allowed by regulation] * * * since the delay for mining at the site was due to circumstances beyond Granite's control" (SOR at 1-2). Granite further explains that:

> After being given a 2 month extension by BLM, Granite made every effort to extract the material by the expiration date, but ran into problems in accomplishing this task. Granite had secured a contract to supply rock and sand to the Calexco Border Crossing Project. When this project was delayed, Granite had to reduce its extraction rate, thereby creating the need for a contract extension.

Id. at 2.

According to Granite, BLM's practice of using a 6-month term for materials contracts "makes conducting business very difficult, particularly in an area such as Imperial County where demand and project schedules are subject to extreme variations, beyond a sand a[nd] gravel operator's control." Id. Continuance of this practice, Granite contends, is contrary to an understanding that was given to the operator by BLM when the Shell Canyon agreement was made. It was then Granite's belief that, following an anticipated increase in the price of sand and gravel at the Shell Canyon location, the term of subsequently issued contracts would be lengthened to a year. Granite concludes this argument with an observation that:

> In spite of the El Centro Office stating that a 6 month contract was a "temporary situation," they now require this length of contract for all materials under 100,000 cubic yards. Granite feels that a return to the original format of the one year contract will benefit all concerned by restoring flexibility to the operators and reducing paperwork for the BLM.

(SOR at 2). Granite also suggests that, since the delayed border crossing project that led to continuance of operations at Shell Canyon in May 1994 was a Federal project, the delay to Granite operations caused by that project should be attributed to BLM, since it is also an agency of the same Government handling the delayed border project.

[1] This line of argument, however, ignores the fact that Granite sought and received a two-month extension of the term of the 1993 sales contract until April 30, 1994. In December 1993, when Granite requested an extension until April 30 of the following year, there was no mention made of a need to obtain a longer extension. Nor did Granite then request, as it now suggests should have been done, that the contract term of the 1993 agreement should have been doubled. Under 43 CFR 3610.1-7, such an extension would have been permissible at the discretion of the Area Manager, had a proper request for it been made. As it was, the extension granted was for the term requested by Granite. Consequently, Granite is in no position to argue that the term selected was inadequate or that events beyond the control of the purchaser operated to frustrate a planned extraction schedule; in this case, the period of the extension granted was exactly what Granite asked for.

A further limitation upon extensions of the contract term also appears as part of the 1993 sales contract itself. Section 20 of Exhibit B - Special Stipulations to the 1993 Contract provides that BLM has discretionary authority to extend the agreement "upon written request by Purchaser, not less than thirty (30) nor more than ninety (90) days before expiration of this contract." This authority is conditioned upon a showing by the purchaser that "his delay in performance is due to circumstances beyond his control and that the extension will not prejudice Government's interest." Id. Any extension sought is also made subject to the condition that "[n]o extension of time may be granted without a reappraisal of mineral materials remaining to be taken under this contract." Id.

Under this section of the sales contract, in order to justify an extension of the contract for a longer term, Granite should have sought extension not later than 30 days before the contract expired, and supported the request with a request for reappraisal of minerals remaining at the site and a showing that the extension would not be detrimental to the Federal interest. See Section 20, Contract Exhibit B, quoted above. The record on appeal does not show that such action was taken in this case. The second request for extension was not made until April 15, 1994, or 15 days before the end of the extended term of the 1993 agreement. No mention appears in the second extension request of factors bearing on the Government's interests, nor is there a request for reappraisal of the minerals found at the Shell Canyon site. Even disregarding the limitation upon extensions imposed by Departmental regulation, therefore, the second extension request made by Granite was facially inadequate to comply with contract requirements for extensions of the contract term.

Accepting as accurate all assertions made by Granite concerning conditions at the site and the circumstances surrounding the company's sand and gravel operations in Imperial County, Granite has failed to show error in the BLM decision here under review. Since Granite was aware of the conditions at the Shell Canyon site when a request for contract extension was first made in December 1993, those factors should have been presented to BLM as part of the first extension request. That a more complete assessment of those factors has now, after the fact, been presented by Granite in support of this appeal, does not excuse the company's failure to make a timely and adequate application for an extension of the time needed to excavate the Shell Canyon site under the 1993 sales contract. BLM cannot now be faulted for the failure of Granite to prepare a proper extension request in December 1993.

Finally, the proper time to question BLM's denial of Granite's second request for extension of the contract term was within 30 days of receipt of written notice of that action; in this case, that appeal period ended on May 30, 1994. See generally, 43 CFR 4.411(a) and (c) (untimely filed appeals not to be considered). Similarly, the time to question the 6-month term of the 1993 sales contract was within 30 days of August 8, when the contract was issued to Granite. Id. No such objections having been made timely, the questions now sought to be raised concerning the term of the materials contract are untimely. See generally, Fred H. Gagon, 134 IBLA 368, 369 (1996), concerning application of the doctrine of administrative finality in such cases as this. We have, nonetheless, considered these arguments in the context of BLM's trespass decision, to determine whether there was error in BLM's finding that the material taken by Granite in May 1994 was removed in trespass. For reasons previously stated, as well as because they are untimely presented, the arguments raised by Granite are inadequate to support the burden of persuasion that Granite must carry if it is to succeed on appeal from the trespass decision presently under review. The record shows that the 1993 sales contract had terminated by the time Granite excavated the material removed from Shell Canyon in May 1994 and that Granite had actual notice of that fact, and that excavation

and removal of materials from the site after April 30, 1994, was done in trespass. We therefore find that Granite has failed to show error in the BLM decision appealed from.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness
Administrative Judge

I concur:

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James L. Burski
Administrative Judge